Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

CSX TRANSPORTATION, INC.,

Petitioner,

v.

LANZY WILSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether railroads can settle an occupational injury claim brought by an employee pursuant to the Federal Employers Liability Act (hereinafter called "FELA") by obtaining from such employee, as part of the settlement agreement, a Release of further liability for specific injuries from a cause or causes specifically identified in that Release, including injuries which occur after the date of execution of the Release, without violating §5 of the FELA, 45 U.S.C. §55, which proscribes any contract enabling a railroad to exempt itself from FELA liability.

RULE 29.1 LISTING

CSX Corporation is the holding company of Petitioner CSX Transportation, Inc.

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PETITION FOR A WRIT OF CERTIORARI

CSX Transportation, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, 83 F.3d 742 (6th Cir. 1996) (originally issued as an "unpublished decision" but designated for publication by separate Order, App., *infra* at 10a), is in the appendix to this petition at 1a-9a. The Order of the Court of Appeals denying the Petition for Rehearing is in the appendix to this petition at 11a-12a. The Order of the United States District Court for the Middle District of Tennessee is in the appendix to this petition at 13a. The District Court's unpublished opinion in support of that Order is in the appendix to this petition at 14a-21a.

JURISDICTION

The Court of Appeals entered its Order denying the Petition for Rehearing on April 18, 1996. App., *infra* at 11a-12a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 5 of the FELA, 45 U.S.C. §55, provides in relevant part:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

STATEMENT

This case presents an issue critical to the settlement of "occupational" injury claims (as opposed to one-time "traumatic" injury claims) brought pursuant to the FELA, 45 U.S.C. §§51-60: whether a Release, the validity of which is otherwise unquestioned, may legitimately contemplate and apply to specified injuries occurring from specifically identified causes after the date of the execution of the Release without violating §5 of the FELA.

The case arose when Lanzy Wilson (hereinafter called "Mr. Wilson") sued CSX Transportation, Inc. (hereinafter called "CSXT") under the FELA for pulmonary injuries allegedly resulting from his inhalation of dust on CSXT's Nashville, Tennessee property while he was performing his employment duties for CSXT. The United States District Court for the Middle District of Tennessee had jurisdiction over the case pursuant to 45 U.S.C. §56. On appeal, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §§1291 and 1294.

Prior to his filing of the Complaint in the instant case, Mr. Wilson had sued CSXT under the FELA in the state court of Alabama for pulmonary injuries allegedly resulting from his inhalation of dust on CSXT's Nashville, Tennessee property while he was performing his employment duties for CSXT. Mr. Wilson and CSXT settled that lawsuit; in consideration for monies paid, Mr. Wilson dismissed his Alabama lawsuit and executed a Release in favor of CSXT, the full text of which is in the appendix to this petition at 22a-26a. It is undisputed that the Release expressly released CSXT from further liability for injuries suffered by Mr. Wilson " . . . arising from or contributed to by the inhalation or ingestion of any and all substances including dust and fumes of any type, while [Mr. Wilson is] employed by CSXT." App., *infra* at 22a. There is no allegation that this Release was induced through fraud or duress, the adequacy of the consideration for the Release has never been challenged, and the allegation in the original Complaint that the Release was the product of a mutual mistake has been abandoned by Mr. Wilson and is therefore not before this Court.

After settling his Alabama lawsuit, Mr. Wilson bid for and returned to his previous job; he alleges in the instant Complaint that he continued to inhale dust at work and to experience pulmonary injury. CSXT raised the prior Release as an affirmative defense to the case at bar and moved for summary judgment on that basis. The District Court granted that Motion and dismissed the Complaint.

The Court of Appeals reversed, ruling that, as a matter of law, an FELA Release may not serve as an affirmative defense "for new injuries sustained by [the plaintiff] after [the Release's] execution." App., *infra* at 7a. The Court of

Appeals based its decision on §5 of the FELA, 45 U.S.C. §55, opining that "[b]y including §55, Congress was seeking to prevent employers from undermining the liability created by the statute." *Id.* The Court of Appeals expressly held that the Release could only legally apply to injuries suffered by Mr. Wilson before he signed the Release but not to new injuries which occurred after it was signed. *Id.* The Court of Appeals then reviewed the record and determined that there was a genuine issue of material fact concerning whether Mr. Wilson suffered "new" injuries after signing the Release. *Id.* at 7a-9a. The Court of Appeals examined the evidentiary question only because it had determined that the application of the Release to injuries which occurred after the execution of the Release was void; the District Court, as noted by the Court of Appeals, never had to reach the evidentiary issue because of its holding that the Release precluded all recovery. *Id.* at 7a.[1]

The question presented here, therefore, is whether such a Release, the validity of which is otherwise unquestioned, may legitimately contemplate and apply to specified injuries occurring from specifically identified causes after the date of the execution of the Release without violating Section 5 of the FELA.

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[1] The Court of Appeals noted that "[b]ecause the District Court relied on the applicability of the release, it was not necessary for it to reach this issue [of the existence of new, post-release injuries]. Our finding as to the release, however, necessitates a more lengthy discussion of the issue." App., *infra* at 7a. The evidentiary issue, therefore, is not before this Court and is not the subject of this petition; if this Court reverses the Court of Appeals on the §5 issue, the existence or non-existence of "new" injuries is moot.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Interpretation of 45 U.S.C. §55 Is in Conflict with This Court's Decisions and Creates a Split among the Courts of Appeals Regarding the Method of Settlement of FELA Occupational Injury Claims.

The Sixth Circuit's holding in this case made a sweeping change in the process of settling cases brought under the Federal Employers' Liability Act and rendered an interpretation of 45 U.S.C. §55 not previously found in FELA jurisprudence. If the Court of Appeals opinion stands, railroad defendants such as CSXT, when faced with ongoing occupational injury claims (such as this claim based on the continuous inhalation of dust or a claim for hearing loss based on continuous noise exposure, as opposed to one-time "traumatic" injury claims), will be able to settle such a case only if the plaintiff's not returning to work is a part of the settlement; under the ruling of the Circuit Court, if the plaintiff does return to work, he or she is free to file a new lawsuit for continuing injuries identical to those for which he or she sued and settled in the previous lawsuit, notwithstanding express understanding to the contrary set forth in a Release. The Sixth Circuit has ruled in this case that, as a matter of law, an FELA Release may not serve as an affirmative defense "for new injuries sustained by [the plaintiff] after [the Release's] execution." App., *infra* at 7a.

The Court of Appeals' holding that the Release is invalid is based on 45 U.S.C. §55, which proscribes any contract which enables a railroad to "exempt itself from any liability created by this chapter. . . . " This Court has,

however, unambiguously held to the contrary. In *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948), Justice Jackson, speaking for this Court, delivered the ruling on the precise question at issue in the case at bar:

> The plaintiff has also contended that this release violates §5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to "exempt itself from any liability created by this chapter, shall to that extent be void." ***It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility.*** *Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.*

Id. at 630-631, " " in original, emphasis added. This Court's position could not be clearer – a Release is obviously not the "device" contemplated by §5 of the FELA.

This Court later made the same holding in *Boyd v. Grand Trunk West. R.R.*, 338 U.S. 263 (1949), noting that "a full compromise enabling the parties to settle their dispute without litigation . . . did not contravene the [Federal Employers Liability] Act," as opposed to a device which obstructs the right of the Plaintiff to secure recovery if he should choose to pursue a judicial trial. *Id.* at 266. *See also South Buffalo Ry. v. Ahern*, 344 U.S. 367 (1953), in which this Court held that "full and fair compromises of FELA claims do not clash with the policy of the [Federal Employers Liability] Act." *Id.* at 372.

Section 5 of the FELA has been examined in depth by this Court, first in *Duncan v. Thompson*, 315 U.S. 1 (1942),

in which this Court held as violative of §5 a contract whereby an employee was paid an advance of $600 and agreed to repay that money before filing a Complaint under the FELA. This Court was clear, however, to specify that the type of "contract or device" it was declaring void under §5 was not a release obtained as part of a settlement: "We need not here determine what limitations, if any, Section 5 places upon the validity of agreements not to sue if made in consideration of a bona fide compromise and settlement of claims arising under the Act, because the very language of the agreement indicates it is not a compromise and settlement." *Id.* at 7.

This Court revisited the issue in *Callen* and *Boyd, supra*, and in both cases held that Releases were not the "devices" contemplated by Congress in the promulgation of §5 of the FELA. This Court next decided *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952), in which this Court did indeed rule that the Release at issue was void, but not because of §5; instead, this Court held that a "release of rights under the Act is void *when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release.*" *Id.* at 362, emphasis added.[2] This Court made a point, however, to rule that Releases were free of the proscription of §5, noting that "Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration." *Id.* at 361-62, citations omitted.

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[2] There is no allegation of any fraud or misrepresentation on the part of CSXT in the case *sub judice*.

After again ruling that a Release entered into without fraud, duress, or mistake was not in any way contemplated by §5 in *Ahern, supra,* this Court examined the statute once more in *Maynard v. Durham & S. Ry.*, 365 U.S. 160 (1961), holding that Releases free of fraud and supported by adequate consideration do not run afoul of the FELA.

Both the statutory construction and the policy analysis of this line of cases from this Court are beyond question. In the early twentieth century, there were instances where railroads required employees to execute pre-employment contracts in which the employees' FELA rights were waived in exchange for payments by the railroad into general "relief funds." It was just these sorts of arrangements that §5 was intended to proscribe, and it was these situations that the cases relied upon by the Sixth Circuit were actually addressing.

The Sixth Circuit cites *Philadelphia, B. & W. R.R. v. Schubert*, 224 U.S. 603 (1912) for the proposition that "such an agreement [regarding a 'relief fund'] is one for immunity in the described event, and as such it falls under the condemnation of the statute." *Id.* at 612, App., *infra* at 6a. The *Schubert* case does **not**, however, deal with a Release but with a "contract of membership" in the railroad's relief fund. *Id.* at 606. That "contract" was not a release of an injury claim but was instead "part of the conditions of employment." *Id.* at 606. In other words, the railroad had required the plaintiff to sign the contract in order to become an employee irrespective of the existence of any particular injury; the railroad had, therefore, exempted itself through this "contract" from any liability that might arise in the future. As this Court pointed out

in *Schubert*, "[t]he practice of maintaining relief departments . . . was well known to Congress" in its passage of §5. *Id.* at 612. This Court thus held in *Schubert* only that §5 was intended to prevent the existence of such relief funds from serving as an exemption from liability and noted that the promulgation of §5 "clearly indicates the intent to include within the statute stipulations which made the acceptance of benefits under contracts of membership in relief departments equivalent to a release from liability." *Id.*[3]

The Court of Appeals' reliance on *Schubert* is also misplaced because, as this Court has pointed out, "the agreement at issue in the Schubert case was made prior to the injury, and the actual decision therefore does not control agreements which, like that now before us, are made after the injury has occurred." *Duncan v. Thompson*, 315 U.S. 1, 4 (1942).[4] The Release in the instant case was made after the alleged injuries and covers both past and future injuries.

The Court of Appeals holding is in conflict with the prevailing decisions from several other Circuits, which

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[3] The Ninth Circuit explained the holding of the *Schubert* Court further: "The Court noted that the practice of obtaining waivers prior to accidents and as an incident of employment was well-known to Congress and the object of §5." *Bay v. Western Pac. R.R.*, 595 F.2d 514, 516 (9th Cir. 1979).

[4] Of course, §5 does apply to some contracts executed after the injury, as this Court pointed out in *Duncan* (railroad's requirement that employee repay $600 advance given to employee prior to injury disallowed). The analysis of §5 in *Schubert* on which the Sixth Circuit relied, however, does not apply to such post-injury agreements.

have held that Releases are not the object of §5. *See Bay State Dredging & Contracting Co. v. Porter*, 153 F.2d 827 (1st Cir. 1946) ("We do not believe that §5 would invalidate a contract of release incident to a fair settlement of an accrued claim for damages." *Id.* at 832.); *Panichella v. Pennsylvania R.R.*, 268 F.2d 72 (3rd Cir. 1959), *cert. denied*, 361 U.S. 932 (1960) ("As the plaintiff readily admits, Section 5 of the Act of April 22, 1908 was never intended to forbid *bona fide* agreements of release." *Id.* at 75.); *Heagney v. Brooklyn East. Dist. Term.*, 190 F.2d 976 (2nd Cir. 1951) ("In construing the Act, the Supreme Court has held that nothing in the Act, and in particular in this section [§5], operates to prevent an otherwise valid release of a claim by a railroad employee." *Id.* at 978.); *Good v. Pennsylvania R.R.*, 384 F.2d 989 (3rd Cir. 1967) ("The fact that this action was brought under the Federal Employers Liability Act does not remove it from the realm of the law of contracts. The obligation to remain bound by a valid agreement of settlement duly entered into by counsel with the authority of his client is one which pervades the law and applies to injured railroad employees as well as all other contracting parties." *Id.* at 990.).

The one Circuit Court opinion relied upon by the Court of Appeals, App., *infra* at 6a, is *Taylor v. Wells Fargo & Co.*, 220 F. 796 (5th Cir. 1915), a case in which a railroad sought specific performance of a contract whereby the employee had agreed that "neither the railroad nor its owning company should, *under any circumstances*, be liable for any injury occurring to him while so traveling, whether such injuries arose from any fault, carelessness, or negligence, gross or otherwise, on the part of said

railroad company." *Id.* at 797, emphasis added. This contract was entered into prior to there being any injury, and it obviously makes no reference to any specific injury; furthermore, it applied irrespective of the application of any fault. This Fifth Circuit opinion, however, does not involve a Release. As Circuit Judge Pardee's dissenting opinion makes clear, the "contract" in question was really a sort of ticket whereby Taylor traveled the rails of the railroad company as an employee of a sister express company. *Id.* at 799.

The Sixth Circuit relied upon *Cordiano v. Consol. Rail Corp.*, 87 Ohio App.3d 398 (1993), in which the Ohio court of appeals held that "the general release is not effective as to any future hearing loss sustained as a result of a *new* accident." *Id.* at 401, App., *infra* at 6a, emphasis added. This is the only case relied upon by the Circuit Court that actually involves a Release; furthermore, *Cordiano* was a 2-1 decision of an intermediate *state* appellate court which was interpreting and applying *federal* law. The case was decided, moreover, upon the factual question of whether the plaintiff *had* a new injury outside the terms of the release, not whether the plaintiff *could* release the railroad from continuing damage to his hearing. That distinction is apparent from the disagreement between the majority and dissenting opinions over the application of Ohio law and procedure regarding the evidence needed for opposition to summary judgment motions.

What the Court of Appeals misapprehended is the language in the Release at issue in *Cordiano* emphasizing and absolutely depending upon specific locations and dates. The Release signed by Mr. Cordiano released the railroad from, and only from:

> . . . all liability for damages, costs, expenses and compensation of any kind, nature or discretion now existing or which may hereafter arise from or out of injuries and damages, known or unknown, permanent or otherwise, sustained or received by me, including hearing loss, *at or near Crestline, State of Ohio on or about the 27th day of January, 1982 and at or near Industry, State of Pennsylvania on or about the 8th day of June, 1982 and at or near Columbus, State of Ohio, on or about the 15th day of August, 1968 and the 29th day of November, 1984.*

Id. at 401, emphasis added. The Ohio court makes it clear that this "general release is valid for all hearing loss Cordiano suffered *as a result of the dates and places listed above.*" *Id.*, emphasis added.

This cited language is obviously dissimilar from the language of the Release signed by Mr. Wilson in the instant case, which Release encompasses all dates on which Mr. Wilson is "employed by CSXT" and is not limited to any specific place, instead releasing CSXT "from all liability for all claims for occupational disease or personal injury . . . *arising from or contributed to by the inhalation or ingestion of any and all substances including dust and fumes* of any type, while employed by CSXT." App., *infra* at 22a, emphasis added.

The *Cordiano* opinion should be limited to its facts. The Ohio court's reference to a "new accident" is important because of the specific prior accidents set forth in the Release at issue in that case; conversely, there are no such specified accidents in the Release which is relevant to the case at bar. The negotiations between Mr. Wilson and CSXT led to payment by CSXT for any injuries "arising from or contributed to by the inhalation or ingestion of any and all substances including dust and fumes" during Mr. Wilson's employment with the railroad.

The Sixth Circuit's broad and sweeping holding in this case fails to state the governing law accurately. A railroad employer may not legally require an employee to execute a contract exempting the railroad from liability for future injuries; for example, an employee with an employment-related traumatic leg injury may not be required to release the railroad from liability for a future arm injury. This example does not fit the instant situation, however, because the Release at issue applies to continuing occupational injuries from a specified source that was the precise alleged cause of the pre-Release injuries.

The issue before this Court concerns a post-injury Release of liability, in which the Release addresses future, as well as past, injuries from the same cause as the initial injuries. When an employee alleges injury to his lungs from occupational dust, the probable course of that condition from past and future employment is sufficiently evident to allow informed judgments by the parties at the time of settlement. A compromise and settlement that involves adequate compensation and execution of a full Release, enforceable upon both parties, is not inconsistent with the FELA.

II. The Holding of the Court of Appeals Will Have Important Consequences Affecting the Settlement of FELA Occupational Injury Claims.

The question presented by this petition is of importance beyond the academic or episodic. The settlement of FELA occupational injury claims is a live issue affecting the railroad industry and its employees across the country. Every "occupational injury" claim – whether it be hearing loss, carpal tunnel syndrome, asbestosis, silicosis, dust inhalation, or the like – faced by railroad employers such as CSXT is different in kind from one-time "traumatic" injury claims that can be settled without the need of considering the likelihood of the continuation of the injury process when the employee returns to work; instead of citing a particular, specific injurious event, these "occupational" injury claims are based on the allegation that "exposure" to the harmful agent is necessarily incident to the employment of the plaintiff. In order to settle such a claim, therefore, the occupational injury to the plaintiff in the future must be considered and negotiated just as specifically as the past injury, since the negligent exposure has allegedly not ended if the employee continues to work. The Court of Appeals decision eliminates the possibility of settlement of an occupational injury claim, allowing the employee to submit identical claims *ad infinitum* for the same injury upon his return to work, just as Mr. Wilson has done.

It is axiomatic that fair and speedy settlement of claims is a crucial public policy goal. Settlement is no less crucial when the alleged injury is an occupational injury rather than one resulting from a traumatic event. If the Court of Appeals opinion is not reversed, complete or

final settlement of FELA occupational injury claims will be an untenable option, since a release obtained in such a settlement would not bar future claims by the same plaintiff for the same injury process.

By reversing the Court of Appeals, this Court would positively affect this important issue by paving the way for efficient and final settlement of such claims where the employer and employee both recognize and negotiate the settlement value of potential future injuries.

CONCLUSION

This Court should grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 94-6475

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Lanzy WILSON, Plaintiff-Appellant	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
v.	)	
CSX Transportation, Inc. Defendant-Appellee	)	
	)	(Filed Mar. 6, 1996)

Before: Merritt, Chief Circuit Judge; Batchelder, Circuit Judge, and Dowd,* District Judge.

MERRITT, Chief Circuit Judge. Lanzy Wilson, the plaintiff, brought this suit under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter "FELA"), against his employer, CSX Transportation, seeking damages for personal injuries. The District Court granted summary judgment for the Defendant. For the reasons stated below, we reverse the District Court's granting of summary judgment, and remand the case for further proceeding in light of this opinion.

I. Background

Lanzy Wilson began working for CSX Transportation in October of 1973. Prior to September, 1991, he made a

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*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

claim against the Company for lung disease which he alleged was caused by dust he inhaled on the job. The claim was settled in September, 1991, when he received $13,500 in exchange for signing a release form. The release form stated, in part:

> I, *Lanzy J. Wilson*, . . . hereby acknowledge receipt of . . . *$13,500.00*[ ] from . . . CSX TRANSPORTATION, INC. in full settlement and satisfaction of all claims, actions, demands and causes of action as set for below . . . , and in consideration of said payment hereby RELEASE AND FOREVER DISCHARGE CSX TRANSPORTATION, INC. . . . of and from all liability for all claims for occupational disease or personal injury now known to have resulted or suspected to have resulted from my employment with CSXT, and also for known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries to the respiratory system, including cancer of the respiratory system, arising from or contributed to by the inhalation or ingestion of any and all substances including dusts and fumes of any type, while employed by CSXT. The parties agree that a portion of the monies paid for this RELEASE AGREEMENT is for risk, fear and/or possible future manifestation of such injury or disease to the respiratory system as described in this paragraph. Such claims include claims asserted in that certain *Civil Action No. CV-87-6219 . . . styled "Lanzy J. Wilson, Plaintiff vs. CSX Transportation, Inc., Defendant,"* which action is to be dismissed with prejudice
>
> It is the intent of the parties to release any and all claims described herein against those

herein named for personal injury and occupational disease, sustained by THE UNDERSIGNED, however incurred, which might form the basis of any action under the Federal Employers' Liability Act, the Boiler Inspection Act, or any other law or laws, either state or federal, or any action at common law. . . . Such claims are by this understanding and agreement expressly released.

In making this RELEASE AGREEMENT, THE UNDERSIGNED declares that I have relied wholly upon my own judgment; that no representations about the nature and extent of my present or future condition, disabilities or damages made by any physician, attorney or agent of those hereby released, nor any representation regarding the nature and extent of legal liabilities of those hereby released, have induced me to make this settlement; that in determining the amount of settlement there has been taken into consideration not only my ascertained condition, disabilities and damages, but also that my present condition is permanent and may be progressive and recovery therefrom uncertain and indefinite, so that consequences may not now be fully known and could be more numerous and serious than now believed and that consequences not now anticipated may result.

. . . .

THE UNDERSIGNED hereby declares that I have executed this RELEASE AGREEMENT upon the advice and approval of my attorney and that I have had this RELEASE AGREEMENT explained to me by my attorney, that I know and understand the contents hereof and

> sign the same as my own free act with full knowledge that the effect hereof shall be such as to extinguish, and I hereby declare extinguished, now and forever, any and all claims described in this RELEASE AGREEMENT.

After signing the release, the Plaintiff continued to work for CSX. Mr. Wilson claims that after his return to work he made repeated requests to his supervisor for assignments which would not expose him to rock dust without protection. His supervisor refused, allegedly stating that he did not care about Mr. Wilson's medical problems. Another CSX foreman, Ronnie Lackey, indicated in his affidavit that he offered to switch jobs with the Plaintiff, but the supervisor refused. During 1993 and early 1994, the Plaintiff required hospitalization each time he was exposed to rock dust. He testified at his deposition that he was never given more protection than a proper mask, if that, and that he had seen other workers with more advanced protective devices. The Plaintiff stated that he complied with the requests of his supervisor because he feared that if he did not he would lose his job.

As a result of these problems, Mr. Wilson brought a new suit against his employer, the instant action. His first claim alleged that CSX negligently failed to provide him with a safe place to work, failed to provide him with adequate and sufficient protections against and warning about the dangers of the employment, and negligently required him to continue to work in the same capacity and under the same conditions after CSX knew of his medical condition and after the execution of the release. His second claim alleged that the release was the product

of a "mutual mistake of fact" as to the serious and permanent nature of the Plaintiff's injuries and should therefore be rescinded. During the course of the litigation of this case, Plaintiff also put forth the theory that the release was inapplicable because his claim was based on new injuries, which were not covered by the release, because releases which cover future conduct violate §55 of FELA and are to that extent void. The District Court granted Defendant's motion for summary judgment.

II. Analysis

The District Court opinion focuses primarily on the lack of "mutual mistake" because that was one of the two issues raised by the Plaintiff in the initial complaint. The District Court held, correctly, that Plaintiff failed to prove any "mutual mistake of fact." Under FELA, a mutual mistake of fact is sufficient to avoid a release only when the mistake goes to the nature of the injury, not the expected course of healing, and when the mistaken belief is held by both parties. *Manis v. CSX Transp., Inc.*, 806 F. Supp. 177, 179 (N.D. Ohio 1992). Plaintiff failed to allege any mistake on CSX's part. Thus, the "mutual mistake of fact" claim provides no support for Plaintiff's attempt to avoid the release.

The next question to be addressed, then, is whether or not a release governed by FELA may apply to future conduct. From the record before us, it is not clear how much the Plaintiff developed this issue below or on what basis the District Court made its limited finding on this issue. However, because it is a question of law which was fully developed before this court and which, Defendants

concede, was not waived, we will review it *de novo*. *Cook v. American Steamship Co.*, 53 F.3d 733, 738 (6th Cir. 1995).

The validity of a release in a FELA action is governed by federal rather than state law. *Maynard v. Durham S. Ry. Co.*, 365 U.S. 160, 161 (1961). Section 55 of FELA states that,

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable a common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

The Supreme Court has held that railroads may not obtain releases from employees which enable the railroad to exempt itself from liability. *Philadelphia, Baltimore & Washington R.R. Co. v. Schubert*, 224 U.S. 603, 612 (1912) ("[S]uch an agreement is one for immunity in the described event, and as such it falls under the condemnation of the statute."); *see also Taylor v. Wells Fargo & Co.*, 220 F. 796, 797 (1915) ("For such a carrier to be able . . . to exempt itself from the liability created by the statute . . . would be in plain contravention of the explicit provision of section 5 of that statute [now §55]."); *Cordiano v. Consolidated Rail Corp.*, 87 Ohio App. 3d 398, 401 (1993) ("[T]he general release is not effective as to any future hearing loss sustained as a result of a *new* accident.") (emphasis added).

Permitting employers to obtain releases exempting them from future conduct would enable them to treat their employees with impunity. Doing so would contravene both the purpose of FELA and the purpose of §55. The purpose of FELA is to give railway workers a right to

recover fair compensation for injuries negligently caused by their employers. *Dice v. Akron, Cantyon & Youngstown R. Co.*, 342 U.S. 359, 362 (1952). By including §55, Congress was seeking to prevent employers from undermining the liability created by the statute. *Philadelphia*, 224 U.S. at 609. We therefore find that the release signed by Mr. Wilson does not absolve CSX from liability for new injuries sustained by him after its execution. We find that the release applies to injuries suffered by Mr. Wilson before he signed the release, but not to new injuries which occurred after it was signed.

Thus, in order to survive summary judgment, Mr. Wilson must raise a genuine issue of material fact as to whether he suffered "new" injuries after signing the release. We review a grant of summary judgment *de novo*. *Henegar v. Banta*, 27 F.3d 223, 225 (6th Cir.), *cert. denied*, 115 S. Ct. 664 (1994). Although the initial complaint filed by Mr. Wilson does not allege that the injuries which form the basis of this suit were inflicted after he signed the release, Defendant concedes that during the course of the litigation in this case it became apparent that Mr. Wilson's theory was that the release should not apply because he was suing for post-release injuries. Defendant alleges that any post-release change in Plaintiff's condition was not due to new injuries, but rather, to the expected progression of his pre-existing disease. Because the District Court relied on the applicability of the release, it was not necessary for it to reach this issue. Our finding as to the release, however, necessitates a more lengthy discussion of the issue.

The medical testimony relating to whether or not these post-September 1991 exposures caused new injuries

to the Plaintiff is somewhat confusing. Dr. James Hayes testified that,

> Q. Doctor, Mr. Leizerman asked you a question about reinjury. I'm going to draw a distinction for you, when you say that each exposure to dust created a "reinjury," are you saying that each exposure to dust created new problems, or each exposure to dust further exacerbated the old problems.
>
> A. I think there is probably reasonable medical probability of both. The inhalation of the dust can exacerbate an underlying asthma process, which would be an old problem, but I think that the inhalation of dust results in repeated injury to the lungs in the same way that repeated inhalation of asbestos dust, for example, adds new injury on top of old injury.

Jt. App. at 38-39.

Another expert, Doctor Jon Jay Tumen was asked,

> Q: . . . Every time he went out to work in dust, are we having a series of new injuries or exacerbation of old injuries?
>
> A: That is impossible to answer.

Jt. App. at 25.

Yet another expert, Dr. Ben Alper, testified that,

> Q: Doctor, with respect to the permanent chronic obstructive pulmonary disorder, each time he went back out there and exposed himself to dust exposure was he creating a new reinjury to himself?

> A: There's certainly no reason to think otherwise. To what extent or how rapid is a matter of conjecture.
>
> Q: But it is your opinion, to a reasonable degree of medical probability, that each time it is another new injury to him?
>
> A: It would be like – I can't say each cigarette makes it worse, but the overall pattern, yes.

Jt. App. at 33. Later on, however, he was asked, "When he asked you the question about reinjury, are you saying that each time he was exposed to dust there was a new condition created, or are you saying that the old condition was made worse?" He replied, "I would say that the old condition was made worse. There's no reason to suspect a new condition." Jt. App. at 33 (sheet stapled to back of page).

In deciding whether a genuine issue of material fact has been raised as to an issue, this Court must make all reasonable inferences in favor of the non-moving party, in this case, Mr. Wilson. Fed. R. Civ. P. 56; *Henegar*, 27 F.3d at 225 (*citing Adickes v. S.H. Kress Co.*, 398 U.S. 144, 157 (1970)). When viewed in that light, we believe that Mr. Wilson has met his burden and that a genuine issue of material fact exists.

III. CONCLUSION

For the foregoing reasons, the decision of the District Court granting Defendant's motion for summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Case No: 94-6475

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

LANZY WILSON, (Filed May 7, 1996)

Plaintiff-Appellant

v.

CSX TRANSPORTATION,

Defendant-Appellee

BEFORE: MERRITT, Chief Circuit Judge, Batchelder, Circuit Judge; and Dowd,* District Judge.

Upon consideration of the appellant's motion to publish the opinion entered in this Court on March 6, 1996,

It is ORDERED that the motion be and it hereby is **GRANTED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green, pe
Leonard Green, Clerk

---

*The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

No. 94-6475

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LANZY WILSON, Plaintiff-Appellant	)	
v.	)	ORDER
CSX TRANSPORTATION, Defendant-Appellee	)	(Filed April 18, 1996)

BEFORE: MERRITT, Chief Judge; BATCHELDER, Circuit Judge; and DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

*Hon. David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LANZY WILSON	)	
	)	
v.	)	No. 3:93-0538
	)	
CSX TRANSPORTATION	)	

ORDER

Pending before the Court is Defendant's Motion for Summary Judgment (Doc. No. 9) filed on August 15, 1994, to which Plaintiff filed an Opposition (Doc. No. 13) on September 29, 1994.

Consistent with the contemporaneously filed Memorandum, the Court hereby GRANTS Defendant's Motion for Summary Judgment. Accordingly, the Court DISMISSES Plaintiff's action.

Entered this the 5th day of October, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT
COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

LANZY WILSON	)	
	)	
v.	)	No. 3:93-0538
	)	
CSX TRANSPORTATION	)	

MEMORANDUM

Pending before the Court is Defendant's Motion for Summary Judgment (Doc. No. 9) filed on August 15, 1994, to which Plaintiff filed an Opposition (Doc. No. 13) on September 29, 1994. For the reasons stated below, the Court grants Defendant's Motion for Summary Judgment.

I. BACKGROUND

Defendant CSX Transportation ("CSXT") owns and operates a railroad. Plaintiff, Lanzy Wilson, has been employed by the defendant as a maintenance of way worker since October of 1973, on trackage owned and maintained by defendant in and around Nashville, Tennessee.

Both parties agree that the rights and liabilities between them are governed by the Federal Employers' Liability Act (F.E.L.A.), 45 U.S.C. § 51, *et seq.*

Prior to September 1991, plaintiff made a claim against defendant for work-related lung disease. On September 30, 1991, plaintiff executed a release in favor of defendant which purported to hold defendant harmless

of all injuries past and future. In return for releasing defendant from liability, plaintiff received $13,500.00.

Since September 1991, he returned to his position as a maintenance of way foreman with defendant. In that position, he contends he was exposed to and forced to inhale and breathe in metallic, mineral and gas substances. When he returned to work, plaintiff alleges he requested his supervisor on numerous occasions to remove him from a job exposing him to excessive dust, but his supervisor refused to do so.

In his Complaint, plaintiff first alleges that the negligence of the defendant included its failure to provide him with a safe place to work; its failure to warn him of the dangers of the employment which were known to defendant; and its requiring him to continue to work in the same capacity and under the same conditions after defendant knew of plaintiff's medical condition, and after execution of the release. Plaintiff also alleges that defendant's negligence in requiring plaintiff to work in the same capacity caused his future injury to his lungs.

Plaintiff's second cause of action. alleges that the release entered into on September 30, 1991, was a result of mutual mistake of fact, in that both parties were unaware of the serious and permanent nature of plaintiff's injuries.

II. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The Advisory Committee for the Federal Rules has noted that "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note.

An alleged factual dispute existing between the parties is not sufficient to defeat a properly supported summary judgment motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The substantive law involved in the case will underscore which facts are material and only disputes over outcome determinative facts will bar a grant of summary judgment. *Id.*, 477 U.S. at 248, 106 S. Ct. at 2510.

The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable trier .of fact could return a verdict for the non-moving party. *Id.* The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968).

In considering plaintiff's allegations, the Court is mindful of the fact that the relevant review is not whether the evidence unmistakably favors plaintiff or defendants,

but whether a fair-minded trier of fact could return a verdict in plaintiff's favor based on the evidence presented. *Anderson*, 477 U.S. at 252, 106 S. Ct. at 2512.

While the moving party bears the initial burden of proof for its motion, the party that opposes the motion has the burden to come forth with sufficient proof to support its claim, particularly when that party has had an opportunity to conduct discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). It is true, however, that "[i]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

To determine if a summary judgment motion should be granted, the court should use the standard it would apply to a motion for a directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. The court must determine that a reasonable trier of fact would be unable to return a verdict for the non-moving party in order to enter summary judgment. *Id.*, 477 U.S. at 249, 106 S. Ct. at 2511. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citations omitted).

III. DISCUSSION

Defendant contends the facts in this case are not in dispute. Defendant notes that plaintiff has admitted that he signed a release agreement with defendant on September 30, 1991. Defendant asserts the 1991 release bars the present suit.

The release in question states in part:

> Lanzy J. Wilson . . . in full settlement and satisfaction of all claims, actions, demands and causes of action hereby RELEASE[S] AND FOREVER DISCHARGE[S] CSX TRANSPORTATION, INC. . . . of and from all liability for all claims for occupational disease or personal injury now known to have resulted or suspected to have resulted from my employment with CSXT, and also for all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries to the respiratory system, including cancer of the respiratory system, arising from or contributed to by the inhalation or ingestion of any and all substances including dusts and fumes of any type, while employed by CSXT. The parties agree that a portion of the monies paid for this RELEASE AGREEMENT is for risk, fear and/or possible future manifestation of such injury or disease to the respiratory system as described in this paragraph.

In plaintiff's Complaint, plaintiff alleges that the release entered into on September 30, 1991, was a result of mutual mistake of fact, in that both parties were unaware of how serious and permanent plaintiff's injuries were. Defendant argues that there is no mutual mistake as plaintiff alleges in the second claim of his

Complaint. Defendant notes that plaintiff has not even alleged any mistake on the part of CSXT regarding the release. In reviewing the filings in this action, the Court is in agreement with defendant.

The rule in FELA release cases is that a mistake is sufficient to avoid a release only when the mistake goes to the nature of the injury, not to the expected course of healing. *Manis v. CSX Transp., Inc.*, 806 F. Supp. 177, 179 (N.D. Ohio 1992). Based on this law, the Court finds that plaintiff's allegations in his second claim are without merit. Plaintiff has not alleged any mistake on CSXT's part. Moreover, to the extent plaintiff is alleging in his second claim that he did not know how serious his injuries prior to September of 1991 were, case law does not allow this kind of mistake to void a release.

Therefore, the Court finds the release is valid for all respiratory system injury/illness claims associated with the initial injury/illness which gave rise to the release signed in September of 1991. The Court finds that the release is also effective as to any future respiratory system injuries/illnesses which are new and unassociated with the previous injury/illness.

In plaintiff's first claim, plaintiff alleges that after he went back to work after September 1991, he was exposed to and forced to inhale and breathe in metallic, mineral, and/or gas substances. Moreover, plaintiff alleges this exposure caused him to become diseased and sick, and his internal organs, particularly his lungs, were affected and weakened. Defendant denies such allegations and points to the release.

Defendant cites numerous cases in which courts granted summary judgment to defendants in situations similar to plaintiff's. *See Bowman v. Norfolk S. Ry.*, Case No. EV93-22-C (S.D. Ind. 1994); *Satterfield v. CSX Transp., Inc.*, Case No. 93-002-12 (W.D. Va. 1993); *Jackson v. CSX Transp., Inc.*, Case No. 90-272 (E.D. Ky. 1992); *Barnes v. St. Louis Southwestern Railway Co.*, Case No. 904044-R (D.C. Kan. 1992); *Church v. Burlington Northern Railroad*, Case No. 89-C2-307 (N.D. Ill. 1990); *Tate v. Consolidated Rail Corp.*, Case No. 88-4121 (6th Cir. 1989).

However, Plaintiff has offered evidence to the Court in the form of depositions of three physicians who are board certified pulmonologists. Each of those physicians testified that the work plaintiff has performed since 1991 has aggravated plaintiff's pulmonary condition and in effect, plaintiff continues to reinjure himself.

The Court finds that the evidence presented by plaintiff does not create a genuine issue of material fact for the trier of fact. Moreover, the Court concludes a reasonable trier of fact could not return a verdict for plaintiff because the release clearly covers future injuries/illnesses.

The Court finds that the release is unambiguous on its face and clearly applies directly to the case at hand. Plaintiff released all claims – present and future, known and unknown – concerning diseases or injuries to the respiratory system, arising from the inhalation or ingestion of any and all substances including dusts and fumes of any type while employed by defendant. Plaintiff returned to work, performing the same job, knowing he signed the unambiguous release described above.

IV. CONCLUSION

For the reasons stated above, the Court hereby grants defendant's motion for summary judgment.

An Order consistent with the findings herein is filed contemporaneously.

Entered this the 5th day of October, 1994.

/s/ John T. Nixon
JOHN T. NIXON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

RELEASE AGREEMENT

Inc. No. A0987NSH0005

I, *Lanzy J. Wilson,* on behalf of myself, my heirs, personal representatives, and assigns (hereinafter referred to as "THE UNDERSIGNED") hereby acknowledge receipt of *Thirteen Thousand, Five Hundred and No/100*---------- Dollars (*$ 13,500.00*) from and on behalf of CSX TRANSPORTATION, INC. in full settlement and satisfaction of all claims, actions, demands and causes of action as set forth below against those named herein, and in consideration of said payment hereby RELEASE AND FOREVER DISCHARGE CSX TRANSPORTATION, INC., and, to the same extent as if expressly named herein, its or their parent, subsidiary and affiliated companies, its or their leased and operated lines, and the respective predecessors, successors, assignees, lessors, officers, directors, agents and employees of the aforesaid released parties, past and present, as well as their heirs and legal representatives (hereinafter, collectively referred to as "CSXT"), of and from all liability for all claims for occupational disease or personal injury now known to have resulted or suspected to have resulted from my employment with CSXT, and also for all known and unknown, manifested and unmanifested, suspected and unanticipated diseases or injuries to the respiratory system, including cancer of the respiratory system, arising from or contributed to by the inhalation or ingestion of any and all substances including dusts and fumes of any type, while employed by CSXT. The parties agree that a portion of the monies paid for this RELEASE AGREEMENT is for risk, fear and/or possible future manifestation of such injury or disease to the respiratory system as described in this

paragraph. Such claims include claims asserted in that certain *Civil Action No. CV-87-6219 pending in the Circuit Court of Jefferson County, Alabama styled "Lanzy J. Wilson, Plaintiff vs. CSX Transportation, Inc., Defendant,"* which action is to be dismissed with prejudice.

It is the intent of the parties to release any and all claims described herein against those herein named for personal injury and occupational disease, sustained by THE UNDERSIGNED, however incurred, which might form the basis of any action under the Federal Employers' Liability Act, the Boiler Inspection Act, or any other law or laws, either state or federal, or any action at common law, and any derivative claims of the heirs, personal representatives, or assigns of THE UNDERSIGNED, beneficiaries of THE UNDERSIGNED, THE UNDERSIGNED'S estate, dependent children, dependent next-of-kin, those suffering pecuniary loss, or others claiming an interest therein. Such claims are by this understanding and agreement expressly released.

In making this RELEASE AGREEMENT, THE UNDERSIGNED declares that I have relied wholly upon my own judgement; that no representations about the nature and extent of my present or future condition, disabilities or damages made by any physician, attorney or agent of those hereby released, nor any representations regarding the nature and extent of legal liability of those hereby released, have induced me to make this settlement; that in determining the amount of settlement there has been taken into consideration not only my ascertained condition, disabilities and damages, but also that my present condition is permanent and may be progressive and recovery therefrom uncertain and indefinite, so

that consequences may not now be fully known and could be more numerous and serious than now believed and that consequences not now anticipated may result.

THE UNDERSIGNED hereby agrees, as a further consideration and inducement for this compromise settlement, that I shall hold harmless CSXT from loss, expense, or liability or account of any claim, demand, action or cause of action which may be brought against any of them by any other person or company asserting any independent or derivative claim or right whether by law, contract or otherwise, including without limitation actions for contribution or claiming to be subrogated to THE UNDERSIGNED for or on account of the alleged injuries to or diseases of THE UNDERSIGNED from or related to any or all of the claims released herein.

It is further understood and agreed that, while the parties to this RELEASE AGREEMENT are not aware of any unsatisfied liens held by the Railroad Retirement Board with respect to any alleged diseases or injuries covered by this RELEASE AGREEMENT, if any such liens exist or are asserted in the future by the Railroad Retirement Board with respect to such diseases or injuries, THE UNDERSIGNED hereby agrees, as a further consideration and inducement for this compromise settlement, that I shall hold harmless and reimburse CSXT for the amount of such liens.

In making this RELEASE AGREEMENT, THE UNDERSIGNED represents that no person or insurance company has any right or has asserted any right of subrogation under any policy of insurance or otherwise, on account of any medical, hospital, nursing or other

expense for or on account of THE UNDERSIGNED'S alleged diseases or injuries related to any or all of the claims released herein.

In making this RELEASE AGREEMENT, THE UNDERSIGNED admits that no promise or agreement has been made to me, and that this RELEASE AGREEMENT contains the entire agreement between the parties hereto and that all the terms of this RELEASE AGREEMENT are important parts of this contract and are binding upon all parties.

It is further understood and agreed that this is a settlement by compromise of a disputed claim and that the payment made is not to be construed as an admission of liability, all liability being expressly denied.

In making this RELEASE AGREEMENT, THE UNDERSIGNED acknowledges and represents that I am of sound mind, memory and understanding and further am, in all respects, competent to understand and enter into this RELEASE AGREEMENT and I am not under any restraint or duress.

THE UNDERSIGNED hereby declares that I have executed this RELEASE AGREEMENT upon the advice and approval of my attorney and that I have had this RELEASE AGREEMENT explained to me by my attorney, that I know and understand the contents hereof and sign the same as my own free act with full knowledge that the effect hereof shall be such as to extinguish, and I hereby declare extinguished, now and forever, any and all claims described in this RELEASE AGREEMENT.

Signed and sealed this 30th day of September, 1991.

/s/ Suzanne Brown	/s/ Lanzy Wilson Jr.
Witness	Claimant's Signature
/s/ Amelia Fule	/s/ James Wettermark
Witness	Counsel's Signature

Supreme Court, U.S.
FILED
SEP 4 1996
CLERK

No. 96-91

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LANZY WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTION PRESENTED

When a suit under the Federal Employers' Liability Act is settled without expressly addressing the railroad's liability for future acts of negligence, may the employee subsequently claim damages under the FELA for injuries suffered after the release was executed, and which were proximately caused by new acts of negligence?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-91

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LANZY WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case presents no significant issues of federal law. The decision of the Sixth Circuit Court of Appeals and its interpretation of Section 5 of the FELA, 45 U.S.C. § 55, is fully supportable on both the law and on the facts. A release which does not expressly address the question of relieving a railroad from liability for future acts of negligence cannot be used to defeat a claim for damages brought pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51, *et seq.*, for injuries suffered by a railroad employee after the release was executed and which were proximately caused by the railroad's negligence, also occurring after the release was executed.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition for a Writ of Certiorari does not fully and completely apprise this Court of all of the underlying facts giving rise to this appeal. Respondent Lanzy Wilson filed an FELA action in Alabama to recover for pulmonary injuries he sustained in the course and scope of his employment with the respondent, CSX Transportation, Inc. (hereinafter "CSXT"). That action was settled and on September 30, 1991, Mr. Wilson executed the release which is presently in issue.

After executing the release, both Mr. Wilson's physicians and the railroad's physicians returned him to his position as a maintenance-of-way foreman for CSXT. While so employed, in 1993 and early 1994, Mr. Wilson was exposed to excessive rock dust, and his inhalation of same, without adequate respiratory protection, required hospitalization for as long as two weeks at a time.

Mr. Wilson again brought suit seeking to recover for the new injury sustained as the proximate result of the railroad's negligence in failing to provide him with a reasonably safe place to work and in failing to provide him with reasonably appropriate breathing protection after his return to work. Further, plaintiff alleged that the railroad was negligent in assigning him to work which it knew or should have known was medically dangerous to him.

Relying on the release, CSXT sought summary judgment in the district court. The record adduced in the district court on the Motion for Summary Judgment establishes that after Mr. Wilson had returned to work, he had on numerous occasions requested of his supervisor that he not be assigned to a job exposing him to excessive rock dust without adequate respiratory protection.[1] The supervisor refused such request, stating that he did not care about Mr. Wilson's medical problems. The record

[1] In fact, one of Mr. Wilson's fellow foremen even offered to switch jobs with him, so Mr. Wilson would not be forced to work under those conditions.

below also establishes that the railroad failed to provide Mr. Wilson with adequate breathing protection. In particular, the record reflects that Mr. Wilson was assigned to work on and around a yardbroom, which is a large piece of machinery about the size of a locomotive, that operates on the rail and cleans the ballast (rock) which makes up the roadbed. Despite knowing that breathing protection was essential, the railroad never provided Mr. Wilson with anything more than a small yellow paper dust mask for breathing protection, which Mr. Wilson contended was inadequate and negligent for any worker, let alone one with his known medical history.

Substantial unrebutted medical testimony from board certified pulmonologists was also submitted in the district court. This testimony established that Mr. Wilson's assignments into a dust-filled environment subsequent to the release and which required hospitalization, caused new injury upon the new exposures. In both the district court and in the court of appeals, Mr. Wilson contended that the release here in issue did not address the question of future negligent conduct by the railroad. He further contended that such new injuries, occurring subsequent to the execution of the release, were not intended to fall within the language of the release and further, that if they were, the release purported to exempt the railroad from liability for new acts of negligence in violation of Section 5 of the FELA, 45 U.S.C. § 55.

The trial court found that the release barred the present action, but did not address the issue of how Section 5 impacted upon the validity of the release. The Sixth Circuit did address this issue and interpreted Section 5 as precluding the railroad's ability to release itself from the consequences of new injury caused by new negligence since, to suggest otherwise, would enable employers "to treat their employees with impunity." (Op. at 6a).[2]

---

[2] For the convenience of the Court, all citations to the decision of the Court of Appeals will be to the opinion attached to the Petition.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' INTERPRETATION OF 45 U.S.C. § 55 DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR OF OTHER COURTS OF APPEAL

The case at bar is concerned with a release entered into between the parties on September 30, 1991, settling a suit brought by the Respondent to recover for injury to his respiratory system. The settlement of claims is certainly to be encouraged. However, it is Respondent's position that an interstate rail carrier such as the Petitioner, which is subject to all of the provisions of the Federal Employers' Liability Act, cannot obtain from its injured employee a broadly worded release the practical effect of which would relieve the railroad from liability for the consequences of its separate, new and independent acts of negligence some time in the future. The Sixth Circuit Court of Appeals accepted this contention and determined that if the trier of fact concluded that Petitioner had sustained a new injury caused in while or in part by the railroad's negligence, the release would not absolve the railroad from liability.

In the first instance, this is nothing more than a case of contract interpretation. The release in issue here was never intended to operate so as to prohibit an employee from suing for post-release negligence and from recovering for that negligence, as Respondent consistently argued in the lower courts. Although the Court of Appeals did not expressly address that question, construction of the release as including post-execution injuries and acts of negligence is a necessary predicate of the legal question that Petitioner seeks to have this Court decide. And if, as Respondent contends, the release is construed otherwise, particularly in light of the general policy under the FELA as under most states' workers compensation schemes to bar contractual devices to avoid liability for future occupational injuries, then the Petitioner's question

presented simply would not be presented in this case. Thus, even if the legal question, whether a release of claims based on future injuries and future negligence would be valid under Section 5, were the subject of disagreement among lower courts—and, as we show below, it is not—this would not be the proper case in which to decide that question.

None of the circuit court decisions which the railroad contends are in conflict with the Sixth Circuit decision here are even remotely in point. In *Bay State Dredging & Contracting Co. v. Porter*, 153 F.2d 827 (1st Cir. 1946), the court was concerned with an accrued claim for damages. No opinion was voiced regarding the applicability of a release to an unaccrued, *i.e.*, new injury, claim such as was presented by Mr. Wilson in the instant case. In *Panichella v. Pennsylvania R.R.*, 268 F.2d 72 (3d Cir. 1959), *cert. denied*, 361 U.S. 932 (1966), the issue was whether a release entered into between the railroad and the employee also released a third party defendant impleaded by the railroad. In *Heagney v. Brooklyn East. Dist. Term.*, 190 F.2d 976 (2d Cir. 1951), the issue was whether the acceptance of workers' compensation benefits constituted a waiver of FELA rights. And in *Good v. Pennsylvania R.R.*, 384 F.2d 989 (3d Cir. 1967), the issue was not one of release at all, but whether the plaintiff could disavow an oral settlement agreement reached at a pre-trial conference.

These decisions do not conflict with the Sixth Circuit's decision in the case at bar. At best, they merely cite *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948) as dictum.[3] The decision most closely analogous to the instant case is, as appropriately noted by the Sixth Circuit, *Cordiano v. Consolidated Rail Corp.*, 87 Ohio App.3d 398, 622 N.E.2d 406 (1993).[4] As in the case at bar, a

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[3] *Callen* will be discussed in greater detail *infra*.

[4] CSXT apparently belittles this decision because it emanates from an intermediate state appellate court. Yet, Congress has

summary judgment motion was brought by the railroad to test the applicability of a release for a hearing loss claim to a new claim for hearing loss. Relying on Section 5, the *Cordiano* court concluded that "[t]he language of the release does not encompass an additional hearing loss due to an entirely different accident that resulted in a new injury to Cordiano's ears." 87 Ohio App.3d at 402.

The railroad seizes upon the words "different accident" in an attempt to distinguish *Cordiano* from the instant case. CSXT is apparently willing to concede that if, as a result of its negligence, an employee fractures a leg, settles his claim and signs a release, and thereafter, again due to the railroad's negligence, suffers yet a new and different fracture of the same leg, the earlier release will not bar the subsequent claim. However, the railroad attempts to distinguish that factual situation and wants this Court to make the unwarranted assumption that Mr. Wilson's post-release unprotected exposure to rock dust is not a new or different accident.

The Court of Appeals saw through this rather disingenuous argument. There is absolutely no basis upon which to draw the distinction the railroad purports to create between traumatic injury and occupational disease injury. Certainly, there is nothing within the language of the FELA itself which differentiates between the types of injuries. To accept the railroad's contention would permit it to avoid its legal obligations under the FELA with respect to those employees with occupational injury who are returned to work and injured anew by the negligence of the railroad.

To illustrate: Assume that two employees, A and B, are available to clean up a toxic spill. A has previously released a claim for pulmonary injury; B has healthy

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decreed that state courts have concurrent jurisdiction in FELA cases, 45 U.S.C. § 56. There is no reason to believe that the decision is not persuasive authority on the issue presented, or that these jurists are incapable of analytic and intellectual thought.

lungs. Under the railroad's view of this case, it could send Employee A to work at the toxic site without any protection from the effects of the toxic spill and, indeed, would have an incentive to do so because of the release. Moreover, the railroad would have absolutely no incentive to protect the safety of Employee A because the release previously signed by A would forever bar him from prosecuting an action for injury to his lungs as the result of the negligent future conduct of the railroad.

Clearly, when it enacted the FELA, Congress did not envisage such a scenario. This Court has often stated that the FELA was enacted as a

> . . . response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their safety.

Sinkler v. Missouri Pac. R. R. 356 U.S. 326, 329 (1958). *See also, Consolidated Rail Corp. v. Gottshall,* —— US. ——, 114 S Ct. 2396 (1994). Allowing a prior release to preclude recovery for future negligent conduct is inimical to the purposes of the Act. Accordingly, the humanitarian purpose of the FELA would best be served if the Petition for Writ of Certiorari is denied and the decision of the Court of Appeals be allowed to stand.

The decision below, and thus the question that Petitioner seeks to bring to this Court, turns on the distinction drawn by the Sixth Circuit between injuries and acts of negligence occurring up through the time of the release, and injuries and acts of negligence occurring thereafter. It cannot be emphasized too strongly that the medical testimony in this case established that with the post-release negligent assignments to the yardbroom and unprotected exposure to rock dust, Respondent sustained a new injury. As one of Mr. Wilson's treating board certified pulmonologists testified at deposition, the inhalation of the rock dust resulted in repeated injury to the lungs and added new injury on top of old injury.

Mr. Wilson seeks compensation only for the new injury he sustained subsequent to the 1991 release, when the railroad negligently assigned him to tasks exposing him to rock dust without providing adequate breathing protection.[5] The decision of the Court of Appeals in this case does nothing more than recognize that whether there was new and independent negligence and that whether Mr. Wilson sustained a new injury occasioned by such negligence occurring subsequent to the release were issues to be decided by the trier of fact. *Accord Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 815 (6th Cir. 1996), decided shortly after the instant case, in which the court held that for statute of limitations purposes, whether the injury was new or separate, or whether it was a continuation of the old injury, was a question of fact.

In its Petition, the railroad does not dispute this portion of the Sixth Circuit decision. What the railroad does suggest is that under *Callen v. Pennsylvania R.R.*, 332 U.S. 625 (1948), a release can be used to defeat liability for its subsequent negligent acts regardless of the factual circumstances. This is a totally distorted interpretation of *Callen*. The crux of *Callen* is contained in this Court's definition of a release that it "is a means of compromising a claimed liability . . ." 332 U.S. 631 (emphasis supplied). The Court went on to state that "[w]here controversies exist as to whether there is liability . . . Congress has not said that parties may not settle their claim. . ." *Id.* (emphasis supplied).

Callen thus makes it clear that a release falls outside of the operation of Section 5 of the FELA only with respect to claims which had arisen or accrued at the time the release was executed. Properly construed, *Callen* stands for nothing more than the principle that one can settle or compromise an existing FELA claim and cannot

[5] Petitioner submits that the breathing protection actually provided by the railroad was inadequate and improper for all employees, not just himself.

later avoid the binding effect of the release because he then feels somehow disadvantagd.

On the other hand, there is nothing in *Callen*, or in any other pronouncement of this Court which would nullify the ultimate conclusion of the court below to the effect that Section 5 prevents contracts, including releases, from being used to extinguish FELA rights as to claims which have not yet arisen.

This Court, being "mindful of the benevolent aims of the Act, . . . [has] jealously scrutinized private arrangements for the bartering away of federal rights . . ." *South Buffalo Ry. v. Ahern*, 344 U.S. 367, 372-73 (1953) (citations omitted). The release at issue here, as correctly interpreted by the Sixth Circuit, does exactly that. It purports to deprive Mr. Wilson of the right to sue the railroad for injuries proximately caused by the railroad's negligence committed after its execution and, in the words of the Sixth Circuit, "would enable [the railroad] to treat [its] employees with impunity." (Op.at 6a).

Section 5 of the FELA

> . . . declares a public policy to void releases or other exculpatory devices procured under circumstanes that indicate an attempt to avoid Federal Employers' Liability Act liability . . .

Kozar v. Chesapeake & O. Ry., 320 F. Supp. 335, 384-85 (W.D. Mich. 1970), *aff'd in part and vacated in part on other grounds*, 449 F.2d 1239 (6th Cir. 1971) (emphasis deleted). The release in the case at bar is precisely the type of contract or device Congress meant to proscribe when it enacted Section 5. Shortly after its passage, this Court construed Section 5 broadly as including every variety of agreement or arrangement which had as its purpose the avoidance of FELA liability. *Philadelphia B. & W. R.R. v. Schubert*, 224 U.S. 603 (1912). Significantly, in construing the statutory phrase "the purpose or intent of which shall be to enable any common carrier

to exempt itself from any liability created by this act," this Court stated that "the purpose or intent" of such devices "is to be found in their necessary operation and effect in defeating the liabiilty which the statute was designed to enforce." *Id.*

Schubert does not involve a release but, as this Court made clear, substance must control over form. Courts are to look at the effect of the particular agreement and not at the title the parties choose to give it. Moreover, contrary to the contention advanced by the railroad, the release in issue, like the agreement before the Court in *Schubert,* was made prior to the injury for which suit was brought. Again, after Mr. Wilson signed the release and returned to work, he was negligently exposed to the deleterious effects of rock dust and this exposure, as stated by the medical testimony, caused a new injury. Under Section 5, the release cannot be utilized by the railroad to avoid its liability under the FELA for the new injury caused by its post-release negligence. *Cf. Duncan v. Thompson,* 315 U.S. 1,4 (1942), in which this Court indicated that *Schubert* controls in cases, such as the case *sub judice,* where the agreement is made prior to the injury.

Accordingly, the Sixth Circuit correctly concluded that *Schubert* is the controlling precedent to be applied in this case. *Callen,* notwithstanding its broad statements that releases are outside the scope of Section 5, is distinguishable on its facts as it is concerned with a singular injury and applies only to a subsequent action for the same incident that was the subject of the release. It cannot and should not be read as a mandate to railroads to return its employees to work and negligently injure them without fear of FELA liability.

II. THE DECISION OF THE COURT OF APPEALS WILL HAVE NO ADVERSE CONSEQUENCES ON THE SETTLEMENT OF FELA OCCUPATIONAL INJURY CLAIMS

The railroad grossly mischaracterizes the effect the decision below will have on future FELA occupational disease settlements. It contends that cases would never be settled because new claims could always be brought. Yet, for whatever appeal that argument may have, it must yield to the Congressional intent behind the FELA. As one court has stated with respect to the very argument advanced by the railroad:

> However, is such freedom of contract inherently more valuable than the policies that Congress intended the FELA to promote? A reading of 45 U.S.C. § 55 indicates that Congress intended to remove the ability of employees to sell off their FELA rights in exchange for short term gains as well as the ability of employers to pressure or defraud their employees into signing away those same rights . . .
>
> In the instant case, the release goes beyond merely compromising a claimed liability and purports to exempt Defendant for all FELA liability arising out of Plaintiff's employment. The fact that Plaintiff was injured in an accident and reached a settlement with the employer should not serve to lift the restriction on employers from attempting to escape FELA liability by written instrument.

Brophy v. Cincinnati, N.O. & T.P.R.R., 855 F.Supp. 213, 216 (S.D. Ohio 1994).

In the case at bar, the Respondent, Lanzy Wilson, is not seeking to recover for an "old" released injury under the guise of a new theory of recovery. All Mr. Wilson seeks is compensation for the worsening of his pulmonary condition caused by new and distinct acts of employer negligence, committed after the 1991 release had been executed. Respondent respectfully submits that such re-

lease was never intended to cover that eventuality but, even if such intent could be read into the release, it would clearly run afoul of Section 5 of the FELA.

On balance, the right of an FELA claimant to his federally created statutory right must weigh much more heavily than the perceived inability to settle cases.[6] The real impact of adopting the Petitioner's position would be to grant not only this railroad, but all common carriers by rail, the virtually unlimited right to "legally" injure and, indeed, even kill employees by use of a cleverly crafted release designed to exculpate itself from future acts of negligence.

CONCLUSION

This Court should deny a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[6] Indeed, all the Sixth Circuit has done is delegate to the trier of fact the issues of whether Petitioner sustained a new injury and, if so, whether the injury was proximately caused by the railroad's negligence, no matter how slight. *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957). Only after this factual inquiry is resolved does the applicability of the release come into play.